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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 116

JOSEPH J. MASCUCH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 989–991) is not yet reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered May 15, 1940 (R. 991). The petition for a writ of certiorari was filed May 31, 1940. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of the Rules of Practice and Procedure in Criminal Cases, promulgated by this Court May 7, 1934.

QUESTION PRESENTED

The only question properly presented by the petition for writ of certiorari is whether the evidence was sufficient to support the petitioner's conviction for perjury under each count of the indictment.[1]

STATUTE INVOLVED

Criminal Code, Section 125 (U. S. C., Title 18, Sec. 231), reads as follows:

> Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, shall willfully and contrary to such oath state or subscribe any material matter which he does not believe to be true, is guilty of perjury, and shall be fined not more than $2,000 and imprisoned not more than five years.

STATEMENT

On June 14, 1939 (R. 3), an indictment in two counts was returned against the petitioner in the

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[1] This was the only question argued by the petitioner in his brief in the Circuit Court of Appeals and the only one upon which that court passed. However, the petitioner presents several other questions in his petition for writ of certiorari and brief in support. As they were not argued in the Circuit Court of Appeals, the petitioner is precluded from urging them in this Court. In any event, as indicated in the Argument, *infra*, pp. 9–12, these questions are clearly without merit.

District Court for the Southern District of New York (R. 6–11). The first count charged the petitioner with the offense of perjury while testifying, on or about April 12, 1939, before an officer of the Securities and Exchange Commission, to matters material in an investigation duly authorized by the Commission relative to trading operations in the common stock of Breeze Corporations, Inc., by the petitioner, one Douglas C. Hoff and one John Horshor. The count assigned as perjury that the petitioner testified (a) that he owned, both then and during the period he had been connected with Breeze Corporations, Inc., approximately 89,000 to 90,000 shares of its common stock, whereas he knew that at the times specified he owned in excess of such amount; (b) that he knew nothing about and had no connection with, except to guarantee, a brokerage account with the firm of Foster & Adams in the name of one Hazel B. Hoff, whereas he knew that he had loaned Breeze stock as collateral for this account prior to his guaranteeing of the account and had directed operations in trading in Breeze stock in that account; (c) that he did not know anyone named "Edward Van Horn", that the only "Van Horn" he knew was an engineer in Philadelphia and that "Edward Van Horn" was not an employee of Breeze Corporations, whereas he knew that "Edward Van Horn" was an alias used by one Edward Van Schoick, an employee of Breeze Corporations; and (d) that he did not think

that one John Horshor had anything to do with Breeze stock and that he had never had any business dealings with Horshor, or paid him any money, whereas he knew that he had instructed Horshor to trade in Breeze stock and had personally caused him to be hired as an employee by the corporation (R. 7–9). The second count charged the petitioner with the offense of perjury on or about April 13, 1939, while testifying in the investigation by the Securities and Exchange Commission referred to in count one. This count assigned as perjury that the petitioner testified (a) that he had never hired Horshor, whereas he knew that he had personally caused the Breeze Corporations to hire Horshor; (b) that he had no dealings whatsoever with one David Verrier regarding Breeze stock, whereas he knew that he had caused common stock of that corporation to be transferred into Verrier's name and had had dealings with him regarding such stock; and (c) that he had not, either by himself or with others, effected any transactions in Breeze stock from October 1, 1938, to April 13, 1939, whereas he knew that he had effected such transactions during that period. (R. 10–11.)

At the conclusion of the Government's case (R. 482–497), and again at the close of the entire case (R. 638–640), the petitioner moved to dismiss the indictment and for a directed verdict on the ground that the evidence was insufficient to establish the offenses charged. Both motions were overruled

and exceptions noted (R. 521, 640). A verdict was returned finding the petitioner guilty on both counts (R. 729), and he was sentenced to two years imprisonment and a $2,000 fine on each count, the sentences of imprisonment to run concurrently (R. 742, 935). On appeal to the Circuit Court of Appeals for the Second Circuit, the judgment of conviction was unanimously affirmed (R. 989–991).

ARGUMENT

1. The Petitioner contends (Br. 19) that where several assignments of perjury are included in a single count of an indictment and any one of these assignments is not supported by the evidence, a conviction on that count must be reversed.[2]

The rule urged by the petitioner is contrary to the general rule. In *Wharton's Criminal Law* (12th ed.) Vol. 2, Sec. 1567, it is stated that "All the several particulars, in which the prisoner swore falsely, may be embraced in one count, and proof of the falsity of any one will sustain the count."[3] This is the rule prevailing in the Federal courts. *United States* v. *Otto*, 54 F. (2d) 277, 279–280 (C. C. A. 2d); *Claiborne* v. *United States*, 77 F. (2d) 682, 691–692 (C. C. A. 8th); *Clayton* v. *United States*, 284 Fed. 537, 539 (C. C. A. 4th).

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[2] In this connection petitioner asserts that the evidence failed to prove assignment A of the first count and assignment C of the second count.

[3] See also Section 1582 and cases cited in footnote 20 thereof.

The New York decisions cited by the petitioner are not, of course, controlling in the Federal courts. Moreover, the only decision by the highest court of the State which the petitioner cites does not support his contention. *Wood* v. *People,* 59 N. Y. 117. The only question there decided was whether reversible error resulted because the trial court refused to withdraw from the consideration of the jury certain defective or unsustained assignments of perjury after its attention had been specifically directed thereto.[4] Indeed, in the later case of *Harris* v. *People,* 64 N. Y. 148, 153, the New York Court of Appeals followed the general rule.

Also, it should be pointed out, as was stated in the opinion of the Circuit Court of Appeals (R. 990), that petitioner's present contention was not urged in the trial court. He made no request that the jury be charged that it could not convict under either count unless it was convinced that all of the assignments of perjury charged in the count were proved (R. 700–706). On the contrary, by failing to object (R. 724–725) to the charge of the trial court, twice given (R. 719, 729), that it was unnecessary for the Government to prove all of its specifications of perjury in each count, he must be presumed to have acquiesced therein. As was said by the Circuit Court of Appeals (R. 990), "Trial

[4] As hereinafter pointed out (*infra*, pp. 7–9) the petitioner in the instant case did not move to withdraw any specific assignment of perjury from the jury's consideration.

errors will not ordinarily be reviewed on appeal unless called to the trial judge's attention in order to afford an opportunity for timely correction."

If, as we submit, the proof of one assignment of perjury in a particular count is sufficient to sustain that count, it is clear that the petitioner is not entitled to a reversal of his conviction on either count, since he does not argue that there existed a failure of proof as to all of the assignments of perjury in each count, but merely that a particular assignment in each count was not established. It is manifest from the opinion of the Circuit Court of Appeals that at least one assignment in each count was sufficiently proved.[5]

The petitioner further contends that the Circuit Court of Appeals erred in refusing to consider his general trial motions for a dismissal of

[5] The Circuit Court of Appeals said (R. 990): "That at least one assignment in each count was sufficiently proved is clear beyond peradventure of doubt. The appellant's brief does not even argue that the Verrier assignment in count two should not have been submitted to the jury. We think the Hoff assignment in count one was proved with equal completeness. After testifying that he had guaranteed the Hazel Hoff account he was asked to give in his own words a running story of what he knew about it from the very beginning. He replied that he didn't 'know a thing about it" except that the brokers asked him to guarantee it. In fact, it was proved that the account was opened by a deposit as collateral of 300 shares of the defendant's Breeze stock, which stood in another's name, and that he had a great deal to do with the account long before he executed the guarantee."

the indictment and for a directed verdict as requests for the withdrawal of specific assignments of perjury, with the result that he was deprived on appeal of the opportunity of establishing that the evidence failed to sustain assignment A of count one and assignment C of count two (Br. 19, 21–22).

It is apparent, however, from the petitioner's own description of his motions that they were not motions to withdraw from the consideration of the jury any specific assignment or assignments of perjury but were, in effect, general motions for a directed verdict since they sought, as the petitioner concedes, "the withdrawal from the jury's consideration of each and every specific assignment of perjury." (Br. 21.) The motion for a dismissal of the indictment and for a directed verdict made at the close of the Government's case specified ten grounds, which, so far as here pertinent, were directed only to the sufficiency of the evidence in general (R. 482–483), and in the argument thereon defense counsel did no more than review the evidence pertaining to each assignment and argue that it was insufficient to prove that assignment (R. 484–497). The motion made at the close of the entire case merely repeated the grounds of the prior motion (R. 638–640). No request was made to the trial court to withdraw from the jury's consideration any specific assignment of perjury, and there is nothing in the record to indicate that the trial judge considered the motions as being other

than the usual ones for a directed verdict because of insufficiency of evidence. It is elementary that where, as was said by the Circuit Court of Appeals (R. 990), a "restricted submission is desired, it must be requested and refused to be available as an error to be urged on appeal."

In any event, it is clear from the summary of the evidence contained in the trial court's charge to the jury (R. 711–718) that there was sufficient evidence to warrant the submission to that body of each assignment of perjury. The Circuit Court of Appeals, after considering all of the assignments, held that "The proof * * * showed the appellant [petitioner] to be guilty of perjury in respect to each of the assignments, or at least was sufficient to support such a finding by the jury" (R. 990–991).

2. The petitioner raises several contentions in his petition for writ of certiorari and supporting brief which he did not urge in the Circuit Court of Appeals.[6] They are, therefore, probably not open to review in this Court. See *Helvering* v. *Wood,* No. 384, 1939 Term, decided February 26, 1940. In any event, they are clearly devoid of merit.

(a) Petitioner urges (Br. 11–13) that the trial court erred in refusing to give his Requested Instruction No. 6 which, in the alternative, sought to have the jury charged either (1) that good character evidence when taken in connection with the other evidence, may be sufficient to raise a rea-

[6] See footnote 1, *supra*, p. 2.

sonable doubt as to a defendant's guilt, or (2) that such evidence of itself may create a reasonable doubt (R. 701).

However, in excepting to the alleged failure of the trial court to give this charge, counsel for the petitioner specifically requested an instruction in accordance with the second of the alternatives contained in his Requested Instruction No. 6. This the trial court refused to give on the ground that this alternative had been covered in his main charge to the jury. The portion of the charge (R. 721) quoted by petitioner (Br. 11–12) confirms this.[7]

(b) The petitioner also complains of the refusal of the trial court to give his Requested Instruction No. 31 to the effect that he should be acquitted if the jury found that he believed the examining officer of the Securities and Exchange Commission had agreed to allow him to correct his testimony and that he relied in good faith upon such agreement, even if the agreement did not in fact exist

[7] The petitioner's assertion (Br. 12) that "The Court's charge was tantamount to an instruction to the jury that evidence of good character must outweigh the positive evidence in the case before petitioner would be entitled to the benefit of the probative effect of evidence of his good character", is clearly without basis, since it is apparent from the quotation from the charge that all the trial court said was that the evidence of good character must be such "as to raise a doubt of the truth of the positive evidence." Moreover, petitioner neither excepted to the charge nor assigned error with respect thereto (R. 724–728, 939–983), and, consequently, he is not in a position now to complain thereof.

(Br. 13–15). This Requested Instruction was properly denied since, as the trial court said (R. 728), it had been covered in the general charge (see R. 723). It was, of course, not necessary that the precise language of the Requested Instruction be utilized in the charge.

(c) Defendant's Exhibit A, a letter written on May 26, 1939, by the attorney who represented him when he testified before the officer of the Securities and Exchange Commission, is claimed to have been erroneously excluded on the grounds that it corroborated the existence of the alleged agreement referred to above, and that it was an offer to correct the petitioner's testimony and, therefore, had a bearing upon the question of intent (Br. 15–17).

The letter in question (R. 927–928) stated that the petitioner refused to be bound by his testimony unless he were given an opportunity to examine the transcript for the purpose of making corrections, in accordance with the alleged agreement. It is obvious that the District Court properly rejected the letter as corroborative of the alleged agreement, since it was purely a self-serving declaration. Also, in view of the abundant evidence that the petitioner willfully testified falsely before the Commission's officer on April 12 and 13, 1939, this letter, written by his counsel some six weeks later, could clearly have had little, if any, bearing upon the question of intent.

(d) With respect to the petitioner's contention that the trial judge erroneously refused to grant a

mistrial because of a remark made by one of the jurors during the cross-examination of a Government witness (Br. 17–18), it is obvious that the admonitions of the trial judge corrected any possible prejudice (see R. 275).

(e) The petitioner also refers to allegedly improper cross-examination of various witnesses and to the admission of testimony imputing to him the commission of other offenses (Br. 22). However, he fails to point out the particular cross-examination and evidence of which he complains. The scope of the cross-examination was of course within the discretion of the trial court (*Dist. of Columbia* v. *Clawans,* 300 U. S. 617, 632; *Alford* v. *United States,* 282 U. S. 687, 694; *Blitz* v. *United States,* 153 U. S. 308, 312) and the petitioner has failed to make any showing that such discretion was abused.

CONCLUSION

The petitioner presents no question requiring review by this Court. We therefore respectfully submit that his petition should be denied.

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